Supreme Court, U.S.
FILED
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No._____

In The

Supreme Court of the United States

KENNEDY, et al,

Petitioners

v.

CHASE MANHATTAN BANK, et al,

Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Sally S Kennedy
In Proper Person
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THE QUESTION BEFORE THE COURT

The Fair Credit Reporting Act (the Act) requires a creditor to make a firm offer of credit to a consumer, when the creditor obtains a credit report relating to the consumer from a credit reporting agency in connection with a transaction not initiated by the consumer. The Act defines the term firm offer of credit.

QUESTION ONE: Does a consumer have a cause of action against a creditor or a credit reporting agency when the creditor obtains a credit report on the consumer from a credit reporting agency in a transaction not initiated by the consumer, then refuses to honor the offer of credit made to the consumer in connection with the transaction?

QUESTION TWO: Considered alone, Does the following phrase included in an offer of credit to a consumer in connection with a transaction not initiated by the consumer, condition the offer in accordance with the definition of firm offer of credit contained in the Act, "The offered credit may not be extended if, after you respond to this offer, we determine that you do not meet any applicable criteria bearing on credit worthiness,"

PARTIES TO THE PROCEEDINGS

Petitioners:

Richard D. Kennedy

Sally S. Kennedy

Respondents:

Chase Manhattan Bank, USA, N.A.

Bank of America, NA (USA)

Experian Information Solutions, Inc

Trans Union, LLC

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CITATIONS OF THE CASE

Pursuant to Supreme Court Rule 14.1(d), the citation of the official report of the opinion is: *Kennedy v. Chase Manhattan Bank United States*, 369 Fed.3rd 833 (5th Cir. 2003)

BASIS OF JURISDICTION

Pursuant to Supreme Court Rule 14(1)(e)(i), the date the judgment or order sought to be reviewed was entered on May 6, 2004., by the United States Court of Appeals for the Fifth Circuit.

Furthermore, pursuant to Supreme Court Rule 14(1)(e)(ii), a Petition for Rehearing was denied on June 7, 2004.

Moreover, according to Supreme Court Rule 14(1)(e)(iv), the statutory provision believed to confer on this court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Fifth Circuit had jurisdiction based on 28 U.S.C. § 1291..

CITATIONS OF RELEVANT PROVISIONS, STATUTES, AND REGULATIONS

The relevant statutes involved in the case, pursuant to Supreme Court Rule 14(1)(f), include:

15 U.S.C. § 1681;

15 U.S.C. § 1681a;

15 U.S.C. § 1681a(l);

15 U.S.C. § 1681a(l)(2)(A);

15 U.S.C. § 1681a(l)(2)(B);

15 U.S.C. § 1681b(c);

15 U.S.C. § 1681b(c)(1)(B)(i);

15 U.S.C. § 1681b(f);

15 U.S.C. § 1681e;

15 U.S.C. § 1681m(d)(1)(C);

15 U.S.C. § 1681n;

15 U.S.C. § 1681o;

15 U.S.C. § 1681p;

The relevant Federal Rules of Civil Procedures involved in the case, pursuant to Supreme Court Rule 14(1)(f), include:

Fed.R.Civ.P. 8(a)

Fed.R.Civ.P. 8(f)

Fed.R.Civ.P. 12(e)

STATEMENT OF THE CASE

Plaintiffs filed a lawsuit, *pro se*, against defendants for failing to comply with provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*

Plaintiffs are consumers who received pre-approved offers of credit in connection with transactions not uninitiated by the consumers, from two defendants, (hereinafter the Banks)[1], based on credit information provided to the banks by two credit reporting agencies (hereinafter the CRA's) also defendants. This practice is commonly referred to as pre-screening and is permitted by the Fair Credit Reporting Act, (hereinafter the Act). See 15 U.S.C. § 1681b (c). There is no disagreement among the parties that the Act permits pre-screening, however, Plaintiffs contend that the Act prescribes requirements imposed on credit reporting agencies and creditors who pre-screen consumers for offers of credit in connection with transactions not initiated by the consumer, and that failure to comply with these requirements is a cause of action under the Act. The parties disagree on interpretation of certain provisions of the Act and what constitutes compliance and non-compliance with the provisions of the Act. The consumers accepted the offers of credit from the Banks, but the Banks refused to extend credit to the consumers after obtaining post-screening credit reports on the consumers. The consumers believe they qualified for the offers, met the condition that they continue to satisfy the criteria used to select them for the offers and that there were no other conditions contained in the offers.

The Banks' reasons for refusing credit to the consumers were that the consumers did not satisfy "their credit criteria."

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[1] Plaintiff Richard Kennedy received a pre-approved offer of credit from Defendant Bank of America, and Plaintiff Sally Kennedy received a pre-approved offer of credit from Defendant Chase Manhattan Bank.

The consumers had cause to believe that the Banks disqualified the consumers for the offers based on criteria other than the criteria used to select consumers for the offer or for any conditions of the offers permitted by the Act.

Plaintiffs were harmed by the failure of the banks to honor the offers of credit and brought this action on belief that the banks failed to comply with the Act's requirement that a creditor honor an offer of credit made in connection with a transaction not initiated by the consumer.

Plaintiffs also brought an action against the banks for obtaining credit information under false pretenses, and against the CRA's for not maintaining adequate procedures to insure the privacy of consumer reports.

The complaint sets out the background of the lawsuit. In their complaint, the Petitioners, *pro se,* asserted that they received pre-qualified offers for credit card accounts from Chase Manhattan and BOA, and that they accepted the offers by returning the applications. The banks, however, obtained consumer credit reports from Experian and TransUnion and notified the Plaintiffs that, based upon the information in these reports, the banks would not open credit card accounts for the Plaintiffs.

The pre-approved offers are attached as exhibits to the complaint. Each offer provides, in part, that the offered credit may not be extended if, after the consumer responds to the offer, the bank determines the consumer does not meet the criteria used to select the consumer for the offer or any "applicable criteria bearing on creditworthiness.

Chase Manhattan moved to dismiss the complaint for improper joinder because it had not extended an offer of credit to Richard Kennedy (that offer was extended by BOA). Chase

Manhattan also filed a motion to dismiss for failure to state a claim and/or for summary judgment. Chase Manhattan argued that sections 1681b(c) and 1681e did not apply to it because it was not a consumer reporting agency; it had not violated section 1681a by obtaining information under false pretenses because Sally Kennedy granted permission to review her credit history; and its actions did not constitute unfair and deceptive trade practices because it had a legal right to decline to extend credit to consumers not meeting its criteria.

The Plaintiffs opposed Chase Manhattan's motion to dismiss or for summary judgment, arguing that the Act applied not only to credit reporting agencies, but also to the users of this information. The Plaintiffs asserted that a creditor may obtain a credit report without the consumer's permission only when the creditor meets the conditions set forth in section 1681b(c), which allows pre-screening consumers for offers of credit. In particular, they contended a condition of obtaining a credit report is that if the consumer meets the criteria established by the creditor prior to the selection of the consumer for the offer, the creditor must make a firm offer of credit to the consumer. If the consumer accepts this offer, the creditor may obtain a second credit report to verify that the consumer continues to meet the selection criteria. They contend the creditor is not allowed to apply a new set of criteria to the second credit report in order to disqualify a consumer from the credit offer after the consumer has accepted the offer.

Sally Kennedy averred that her credit history did not change between the time that she was selected for the offer of credit and the time that she accepted it, although this assertion is not set forth in the complaint. She asserted that Chase Manhattan did not indicate that any further conditions were made on the offer. She contended that the offer of credit evidenced the fact that she satisfied Chase Manhattan's credit criteria and that Chase Manhattan violated the Act by not

extending this credit to her after it obtained her credit report without her knowledge. She argued that this constituted obtaining the credit report under false pretenses.

Chase Manhattan responded that the Act was amended in 1997 to allow creditors to extend conditional firm offers to consumers. Chase Manhattan asserted that pursuant to section 1681b(c), consumer reporting agencies are permitted to furnish only limited information to creditors during the prescreening process and that after the consumer responds to the credit offer the creditor is permitted to access the creditor's credit report to determine whether the consumer satisfies its previously-determined criteria for credit worthiness. Chase Manhattan contended that after reviewing Sally Kennedy's complete credit history it determined that she did not satisfy its criteria for credit worthiness without explaining what its criteria for creditworthiness consists of or whether or not its criteria could be related to a condition included in the offer.

The district court granted Chase Manhattan's motion to dismiss and held the motion for improper joinder moot. The court determined that section 1681b(c) applied not only to credit reporting agencies but also to the entities requesting credit information. The court agreed with the bank's assertion that it had the legal right to decline credit to consumers who fail to satisfy its credit criteria, that the credit application informed Sally Kennedy of this possibility, and that Sally Kennedy's signature on the application evidenced her agreement to those terms. The court held that a "firm offer" under the Act means a firm offer "if you meet certain criteria" and that dissatisfaction with the pre-screening process did not state a cause of action under the Act.

BOA, TransUnion, and Experian also filed motions to dismiss. The district court granted all three motions, citing the reasons set forth in its order granting Chase Manhattan's

motion to dismiss. The Plaintiffs then moved for rehearing on the banks' motions, arguing, *inter alia,* that a firm is a firm offer if you meet certain criteria, but that the failure of the banks to honor the offers when the consumers meet the criteria is a failure to comply with the Act, and that the finding of the court is not sufficient to dismiss the action. The district court denied the motion for rehearing. The district court then entered judgment in favor of all defendants. The Plaintiffs timely appealed. In their appeal, the Plaintiffs maintain their complaint states a cause of action and that the district court erred by dismissing their claims.

The Plaintiffs on appeal argued that the District Court misinterpreted the definition of firm offer of credit, as that term is defined in the Act, and presented essentially the same arguments made in the district court. Each of the appellees filed briefs presenting essentially the same arguments as in the District Court. BOA also argued that Plaintiffs raised new allegations in the appeal.

Appellants filed a reply brief arguing 1) that "nothing put on paper constitutes a firm offer if the offer is not honored; 2) all of the allegations and facts that the plaintiffs rely on are contained in the statement of facts (Appellant Br. pages 6-10). The complaint was prepared in accordance with Fed.R.Civ.P. 8(a).[2] None of the defendants filed Motions for

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[2] It is well established that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. Quoting from *Alcorta v. State of Texas*, 78 S.Ct. 103, "The respondents also argue that the complainant failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

More Definite Statements in accordance with Rule 12(e); and 3) Appellants presented a specific set of facts that could be proved in support of their claim which would entitle them to relief.

The Court of Appeals reviewed the Motion to Dismiss *de novo,* using the standard established in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957) "In considering a motion to dismiss, the district court must take the facts as alleged in the complaint as true, and may not dismiss the complaint 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"

The Court of Appeals affirmed the lower court decision and found that the banks offers constituted firm offers of credit under the act, and the banks engaged in permissible acts, on May 6, 2004.

Appellants filed a Petition for Panel Rehearing on May 20, 2004, arguing inter alia that the course of conduct of the defendants was lawful until the defendants failed to comply with the act by not honoring the offers of credit.

The Court of Appeals denied the Petition for Rehearing on June 7, 2004.

The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioner's complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. *Cf. Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 58 S.Ct. 507, 82 L.Ed. 745.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The Court of Appeals has changed the substance of the Fair Credit Reporting Act in regards to pre-screening to such an extent that creditors no longer must honor offers of credit made in connection with prescreening consumers.

All consumers, all creditors and all credit reporting agencies who participate or utilize the prescreening process in states covered by the Fifth Circuit Court of Appeals are affected by this opinion. Pre-screened credit card solicitations in the United States number in the billions each year.

As a result of this decision, the protection of consumer credit privacy afforded by the Act has been diminished, and consumers have lost the ability to bring an action against persons who do not comply with certain provisions of the Act as intended by the Congress.

The Fair Credit Reporting Act:

The Act requires a creditor who obtains a credit report relating to a consumer in connection with a transaction not initiated by the consumer to make a firm offer of credit to the consumer. 15 U.S.C. § 1681b(c)(1)(B)(i) relating to credit reporting agencies and § 1681b(f) relating to users of credit reports. The Act defines a firm offer of credit to be any offer that will be honored if the consumer satisfies the criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of four prescribed conditions. See 15 U.S.C. § 1681a(l).

Thus, if after pre-screening consumers, a creditor makes an offer of credit to a consumer, but then does not honor the offer in accordance with § 1681a(l), the offer does not qualify as a firm offer and the creditor has not complied with the § 1681b(c)(1)(B)(i).

"Not extending credit to a consumer," is not the equivalent of "not honoring an offer of credit" in that a creditor may have a legitimate reason for not extending credit to a consumer who does not satisfy a condition of the offer, but a creditor is always required to honor the offer or the conditional offer of credit in accordance with the definition of firm offer of credit at 15 U.S.C. § 1681a(l). If a creditor withdraws an offer to a consumer because the consumer has not met a condition of the offer, the creditor has still honored the offer, but if the creditor withdraws the offer because the consumer has not met with a condition that was not included in the offer, or because the consumer has not met a condition not permitted by the Act, then the creditor has not honored the offer.

The Act authorizes a consumer to bring an action against any person who fails to comply with a provision of the Act. See 15 U.S.C. § 1681n; § 1681o and § 1681p.

THE COURT OF APPEAL'S OPINION:

In order to maintain a claim that the Banks failed to comply with § 1681b(c), the plaintiffs would have to show that the Banks either did not make a firm offer of credit and/or that the banks did not honor the firm offer of credit

The court of appeals in its opinion makes two findings to dismiss the complaint.

The First Finding:

> "The Kennedy's complaint fails to state a claim under the Act because Chas Manhattan's Pre-Approved Acceptance Certificate and BOA's Pre-selected Acceptance Certificate (collectively, the pre-approved certificates) clearly establish that the respective offers constitute firm offers of credit under the Act. Considered together, the complaint and the attached exhibits show (1) the banks offered Sally and/or Richard Kennedy a pre-approved credit card account based on information from a consumer credit report, (2) Sally and/or Richard Kennedy received the offer because the consumer(s) satisfied the specific criteria used by the banks to make the offers, and (3) the credit card accounts were conditioned on the consumers(s) satisfying specific criteria bearing on credit worthiness."

Petitioners agree with the first two reasons stated, but do not agree with the third. The offers were not conditioned on the consumers satisfying "specific" criteria bearing on credit worthiness, but rather, they were conditioned on 1) the consumers continuing to satisfy the criteria used to select the consumers for the offers, and 2) the consumers "satisfying other applicable criteria bearing on credit worthiness," without the other applicable criteria being established. This second condition is not one of prescribed conditions permitted by the Act.

Regardless how the offers were conditioned, that they were conditioned along with the other two reasons are not the factors that can qualify the offers as firm offers of credit as that

term is defined in the Act. See 15 U.S.C. § 1681a(l). *Sampson v. Western Sierra Acceptance Corp.*, No. 03 C 1396, 2003 WL 21785612 (N.D. Ill. Aug. 1, 2003, at *2 (firm offer of credit defined in terms of creditor's intention to honor an offer of credit in accordance with creditor's undisclosed, predetermined criteria).

Because the Act defines a firm offer as, "any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:..."

If, after taking into consideration any of the prescribed conditions, the offers are not honored, they are not firm offers of credit by definition; if the offers are honored, they are firm offers of credit. If the creditor extends the credit to the consumer, there is no reason to question that the offers were honored, but if the creditor does not extend the credit to the consumer, there is reason to question whether or not the creditor honored the offer. It does not follow that if the creditor conditions the offer and does not provide the credit to the consumer that the consumer did not qualify for the offer, a nuance that the Court of Appeals passes over. The consumer may satisfy all of the conditions of the offer, and the creditor may refuse to extend the credit to the consumer in spite of the requirements of the Act.

Here, the Court of Appeals has redefined firm offer of credit as an offer that is sent to a consumer who satisfies the criteria used to select consumers for the offer and that is conditioned on the consumer satisfying specific criteria bearing on credit worthiness, **without regard** for the explicit requirement in the Act **that the creditor honor the offer**. If the creditor refuses to honor the offer, it is not a firm offer by

definition.

This opinion sets a precedent that creditors are not required to honor offers of credit in order to comply with the Act and places a bar on consumers who file actions against creditors who do not comply with the requirement that they make and/or honor firm offers of credit in connection with transactions not initiated by the consumer.

The Second Finding of the Court of Appeals:

> "The Kennedys also complain on appeal that the banks violated sections 1681a(1) and 1681b(c) because the banks declined to extend them credit after extending the firm offers of credit. The Act, however, allows a creditor to use information in a consumer report to verify a consumer's credit worthiness, and to withdraw a firm offer of credit if the consumer does not meet the creditor's previously-established criteria for extending credit....Although the Kennedys insist the banks were prohibited from withdrawing their offers of credit, the Act allowed the banks to withdraw the offers if the Kennedys were not credit-worthy based on the consumers reports. Because the complaint alleged the banks engaged in permissible acts, the complaint failed to state a claim upon which relief could be granted."(footnote omitted)

The Court of Appeals has not accurately restated the allegation. The complaint, after setting out the fact that the consumers received and responded to the pre-qualified offers of credit, made the allegation:

> "Plaintiffs believe that the defendant banks and credit reporting agencies were acting under the provisions of Section 1681b (c) of the Fair Credit Reporting Act which provides for a method by which credit reporting agencies may provide information about consumers in their files to creditors without the permission of the consumers, only under strict controls prescribed in the Fair Credit Reporting Act. When the defendant banks refused to honor the firm offers of credit, they violated the intent and the letter of the statue."

The allegation in the complaint is that the Banks refused to honor the offers of credit, not "the banks declined to extend them credit" Not honoring the offers of credit infers that the banks did not perform in accordance with what they offered to do, that is, to extend credit to the Plaintiffs if the Plaintiffs met the condition of the offer. The Act requires the banks to honor the offers, not to "extend them credit." The phrase the Court of Appeals used, "the banks declined to extend them credit,' does not relate the action of declining credit to the offer and does not necessarily indicate that the banks failed to comply with a provision of the Act.

Copies of the offers were attached to the complaint. It was these offers that were not honored. The offers were in simple terms that the banks would extend credit to the plaintiffs, conditioned only on the fact that the plaintiffs continue to satisfy the criteria used to select the plaintiffs for the offers. The offers contained no other conditions permitted by the Act.

The allegation that the Banks refused to honor the offers clearly infers that the Banks did not fulfill their obligation to

extend credit to the consumers in spite of the consumers having satisfied all of the conditions of the offer. If the plaintiffs had not satisfied the condition of the offer, there would be no allegation that the Banks refused to honor the offers. The Court of Appeals seemed to understand this inference since it states,

> "Sally Kennedy averred that her credit history did not change between the time that she was selected for the offer of credit and the time that she accepted it, although this assertion is not set forth in the complaint. She asserted that Chase Manhattan did not indicate that any further conditions were made on the offer. She contended that the offer of credit evidenced the fact that she satisfied Chase Manhattan's credit criteria and that Chase Manhattan violated the Act by not extending this credit to her after it obtained her credit report without her knowledge."

The Court of Appeals relies on a more contentious issue to find that the banks were engaged in permissible acts,

> "Indeed, the pre-approved certificates notified the Kennedys that the offered credit might not be extended if, after the Kennedys responded to the offers, the banks determined the Kennedys did not meet the criteria used to select them for the offers **and any other applicable criteria bearing on credit worthiness.**[3] Thus, the banks

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[3] Chase Manhattan's notice provided: "The offered credit may not be extended if, after you respond to this offer, we determine that you do not meet the criteria used to select you for this offer or any other applicable criteria bearing on credit worthiness." BOA's notice provided: "The credit may not be extended if, after you respond, we find that you do not meet the criteria used to select you for this offer or any applicable

> fully apprised the Kennedys that the banks would review their credit history prior to determining whether the banks would extend the offered credit." (emphasis added)

The Act requires creditors to notify consumers that the offer may be withdrawn under certain circumstances, 15 U.S.C. § 1681m (d)(1)(C), but this notice alone does not establish that the offer is conditioned without the offer including one of the conditions enumerated at 15 U.S.C. § 1681a(l). The Act does not permit the creditor to condition the offer with such a broad non-specific statement as any other applicable criteria. The notice is designed to warn the consumer that the credit may not be extended based on some applicable criteria, but the applicable criteria are limited to what is permitted by the Act . 15 U.S.C. § 1681a(l) (1)-(3)

The Court of Appeals is under the impression that because the CRA only sends limited information to the creditor in connection with prescreening, that the creditor is entitled to obtain a credit report on the consumer to post screen the consumer based on "other criteria" without making the other criteria a condition of the offer. Under the Act, the creditor is only permitted to verify the information used to select the consumer for the offer, see 15 U.S.C. § 1681a(l)(2)(A), or to verify information in the consumer's application, if the offer is conditioned on information in the consumer's application, see 15 U.S.C. § 1681a(l)(2)(B). The Court of Appeals states:

> "Thus, a creditor must honor a firm offer of credit only if based on information in the consumer report, the application, or other information bearing on credit worthiness, the consumer meets the criteria initially used to select the consumer for the offer. The

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criteria bearing on credit worthiness."

creditor must establish the criteria for the firm offer of credit prior to extending the offer....Consumer reporting agencies, however, are only **permitted to furnish limited information** for a credit transaction not initiated by the consumer. By permitting a creditor to obtain limited information, the Act allows creditors, like banks, to pre-screen potential customers. In the pre-screening process, credit reporting agencies compile **lists of customers who meet specific criteria provided by the creditor**, and then provide the lists to a creditor, who uses the lists to solicit customers with firm offers for credit in the form of pre-approved offers of credit. To access more detailed information **to determine whether the consumer meets a creditor's specific criteria bearing on credit worthiness**, a creditor must obtain a consumer's authorization. Thus, acceptance of a pre-approved offer of credit typically requires the consumer's agreement to permit the creditor to access the consumer's credit information. If a consumer responds to a pre-approved offer of credit, and authorizes the creditor to access the consumer's credit report, the creditor may then access the consumer's credit report to determine whether the consumer satisfies its previously-established [criteria] for credit worthiness. As a result, the Act permits a creditor to make a "conditional" firm offer of credit; that is' an offer that is conditioned on the consumer meeting the creditor's previously-established criteria for extending credit.

The Court of Appeals in its finding that the banks engaged in permissible acts is referring to the argument by the banks that the banks conditioned the offers on the consumers satisfying "other applicable criteria," and that the banks have the right to deny credit to the consumers based on this condition by using a credit report on the consumers. There are two problems with this theory.

First is that this phrase does not constitute a condition under the Act. It was because of this phrase and the plaintiffs belief that the banks denied the consumers credit based on this phrase, that the consumers originated this action. This lawsuit begs to answer the question, does the phrase, "The offered credit may not be extended if, after you respond to this offer, we determine that you do not meet any applicable criteria bearing on credit worthiness," alone, establish a condition in accordance with the act?

In the instant case, the consumers contend that the only condition included in the two offers in question were that the consumers continue to satisfy the criteria used to select them for the offer. The banks argued that the offers were also conditioned on the consumers satisfying any other applicable criteria bearing on credit worthiness. The Court of Appeals agreed with the Banks' arguments and granted the Banks motion to dismiss.

The phrase "any other applicable criteria, and similar phrases, do not satisfy the language of the Act where further conditions are prescribed. Plaintiffs further contend that other criteria are permitted, but only in the context of the further conditions prescribed at 15 U.S.C. § 1681a(l) (1).

> (1) The consumer being determined, **based on information in the consumer's**

> **application** for the credit or insurance, **to meet specific criteria** bearing on credit worthiness or insurability, as applicable, that are established –
>
> (A) before selection of the consumer for the offer; and
>
> (B) for the purpose of determining whether to extend credit or insurance pursuant to the offer. (emphasis added)

In order for a creditor to establish a condition in an offer based on the above, the condition would first of all have to relate to "information in the consumer's application for the credit" and it would have to also be based on "specific criteria." The phrase, "any other applicable criteria" does not relate to information in the consumer's application, and it is not based on the consumer meeting "specific criteria."

Second, even if the offers were conditioned on the consumers satisfying "other criteria" the banks are only permitted to review the post screen credit report for the purpose of verifying that the consumers continue to satisfy the criteria used to select consumers for the offer of credit, and not to verify other criteria. 15 U.S.C. 1681a(l)(2)(A) explicitly permits the use of a credit report to verify that the consumer continues to meet the criteria used to select the consumer for the offer, and § 1681a(l)(2)(B) permits the creditor to verify the "other information" but does not authorize the use of a credit report for that purpose. Other criteria is limited to information in the consumers application and does not include credit history that could be verified with a credit report.

Section 603*(l)* limits permissible post-screening to verifying that the consumers continue to meet the criteria used in the prescreening and to verify any application information

(such as income or employment) that is used in the process of granting credit or insurance...." [4]

The Court of Appeals made its determination that the banks engaged in permissible acts on the belief that because the banks conditioned the offers on the consumers satisfying any "other criteria" that the banks could withdraw the offers without considering whether or not the condition was permitted by the act or that the consumers satisfied the conditions of the offers.

The court has enlarged the definition of firm offer of credit by permitting the Banks to apply their other applicable credit without regard for the limitation on other criteria imposed in the act. The court has essentially added another permitted condition, that is the creditor may condition the offer on other nonspecific criteria.

The act is designed to prevent CRA's from disclosing consumer information, and to prevent creditors from obtaining consumer information unless the creditor has a legitimate business need for the consumer information. The harm created by this enlarged definition of firm offer is that creditor may obtain information on consumers without having to comply with the acts requirement of honoring the offer of credit. Without the requirement to honor the offer of credit, the creditor may use prescreening to merely obtain names of consumers to solicit for the credit, without the requirement that the creditor grant credit to any of the consumers.

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[4] The Federal Trade Commission, Prepared Statement of The Federal Trade Commission on The Fair Credit Reporting Act before the Senate Committee on Banking, Housing and Urban Affairs, May 15, 2003, p.13, footnote 37, http://www.ftc.gov/os/2003/05/030515finalfcratestimony.pdf

Consumers are also harmed in that a consumer who responds for a pre-qualified offer then is denied credit in spite of qualifying for the offer as it was presented to him suffers from having a superfluous credit inquiry in his credit history which may lower his credit score or even prevent him from being approved for credit the next time he applies for credit.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The Court of Appeals reviewed the motions to dismiss *de novo*, and using the standard, "In considering a motion to dismiss, the district court must take the facts as alleged in the complaint as true, and may not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45—46 (1957).[5]

The Plaintiffs alleged that the banks refused to honor the offers of credit. Even taking this allegation only to mean

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[5]In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992 (2002), this Honorable Court reemphasized the extremely liberal pleading standard of the Federal Rules of Civil Procedure, noting that a dismissal of claims is only appropriate in the rarest of circumstances: "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' [citing *Hishon v. King & Spalding* 467 U.S. 69, 73 (1984)]. If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."

that the banks denied credit to the Plaintiffs, after the Plaintiffs responded to the pre-qualified offers of credit, it is not beyond doubt that the Plaintiffs can show a set of facts in support of their claim which would entitle them to relief. Plaintiffs merely need to show that they responded to the offers of credit, were denied credit, and that they satisfied the conditions of the offer, or that the defendants did not condition the offers.

Plaintiffs did in fact present a set of facts in support of their claim in the Appellants Reply Brief. Even though the complaint alleged that the banks refused to honor the offers, the Court of Appeals never discussed the meaning of "any offer that will be honored. or

The allegation taken as true and all questions resolved in favor of the non moving party support the Plaintiffs cause of action, and the Motions To Dismiss should not have been granted by the Court of Appeals, nor by the District Court.

The Court of Appeals in ruling that there are no set of facts that would entitle the Plaintiffs to relief, has unequivocally stated that not honoring a firm offer of credit is not a cause of action under the Act.

IN CONCLUSION

The Fifth Circuit Court of Appeals has taken away the consumer's right to file an action when a creditor fails to comply with the requirement that the creditor make a firm offer of credit and honor the terms of the offer when the creditor obtains credit information on a consumer in connection with a transaction not initiated by the consumer.

The Fifth Circuit Court of Appeals has enlarged the definition of Firm Offer of Credit as that term is defined by the Act 15 U.S.C. 1681a(l) to include a new permitted "further condition" which is that a creditor may condition an offer on the consumer satisfying any other applicable criteria bearing on creditworthiness. The Congress has not enumerated such a condition. The Court of Appeals has taken away the consumer's right to bring an action against creditors that deny credit to consumers based on this unlawful condition.

Therefore, Petitioners Richard D. Kennedy and Sally S. Kennedy request this Honorable Court to Grant this Petition for a writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,
Richard D. Kennedy, and
Sally S. Kennedy,
In Proper Person
2517 Danny Pk
Metairie, Louisiana 70001
504 455-2617

In The

Supreme Court of the United States

KENNEDY, et al,

Petitioners

v.

CHASE MANHATTAN BANK, et al,

Respondents

On Petition For Writ Of Certiorari
To The Fifth Circuit Court Of Appeal

APPENDIX

United States Court of Appeals
Fifth Circuit
FILED
May 6,2004
Charles R. Fulbruge Ill
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03—30811

RICHARD D. KENNEDY; SALLY S. KENNEDY,

Plaintiffs - Appellants,

versus

CHASE MANHATTAN BANK USA, NA;
EXPERIAN INFORMATION SOLUTIONS, INC.;
TRANSUNION, LLC; BANK OF AMERICA, NA (USA),

Defendants - Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before DAVIS, BENAVIDES, and PRADO, Circuit Judges.
PRADO, Circuit Judge:

This appeal arises from a lawsuit brought by Richard D. Kennedy and his wife, Sally S. Kennedy, under the Fair

Credit Reporting Act (the Act) against Chase Manhattan Bank USA, NA (Chase Manhattan); Bank of America, NA (USA) (BOA); Experian Information Solutions, Inc. (Experian); and Transunion LLC (Transunion). In their complaint, the Kennedys asserted that the banks violated the Act by obtaining their credit information under false pretenses and by failing to adopt reasonable procedures for complying with the Act. The Kennedys further alleged that Experian and Transunion (collectively, the consumer reporting agencies) failed to adopt reasonable procedures for complying with the Act.

In response to the Kennedys' complaint, the banks and the consumer credit reporting agencies moved to dismiss the Kennedys' claims for failure to state a claim. After considering the motions, the district court determined the Kennedys' allegations were not actionable under the Act and dismissed the Kennedys' claims. The Kennedys' challenge that determination in this appeal.

Factual Background

The Kennedys' complaint sets out the background of their lawsuit. In their complaint, the Kennedys, *pro se,* asserted that they received pre-qualified offers for credit card accounts from Chase Manhattan and BOA, that based on the representations made by the banks the Kennedys believed they were pre-approved for credit, and that they accepted the offers by returning the applications. The banks, however, obtained consumer credit reports from Experian and Transunion and notified the Kennedys that, based upon the information in these reports, the banks would not open credit card accounts for the Kennedys.

The pre-approved offers are attached as exhibits to the complaint. Each offer provides, in part, that the offered credit may not be extended if, after the consumer responds to the offer,

the bank determines the consumer does not meet the criteria used to select the consumer for the offer or any "applicable criteria bearing on creditworthiness.

Throughout their lawsuit, the Kennedys maintained the banks violated the Act by failing to honor firm offers of credit. The Kennedys contended the banks violated section 1681g of the Act by obtaining information under the Act under false pretenses, and/or violated section 1681e by not maintaining reasonable procedures and certifications necessary to comply with the Act. The Kennedys argued that the credit reporting agencies violated section 1681e by "not adopting reasonable procedures for meeting the needs of commerce for consumer credit in a manner which is fair and equitable to the consumer with regard to confidentiality and proper utilization of such information in accordance with the requirements of the Fair Credit Reporting Act." The Kennedys asserted that: the defendants' actions constituted unfair and deceptive trade practices; the credit offers contained low introductory rates and balance transfer rates that would have saved them money; their credit history was damaged by having a declined credit investigation on their credit records; and they suffered humiliation, mental pain, and anxiety due to the defendants' willful and wanton disregard for their rights. The Kennedys sought actual and punitive damages, as well as costs and attorney's fees.

Chase Manhattan moved to dismiss the complaint for improper joinder because it had not extended an offer of credit to Richard Kennedy (that offer was extended by BOA). Chase Manhattan also filed a motion to dismiss for failure to state a claim and/or for summary judgment. Chase Manhattan argued that sections 1681b(c) and 1681e did not apply to it because it was not a consumer reporting agency; it had not violated section 1681a by obtaining information under false pretenses because Sally Kennedy granted permission to review her credit history; and its actions did

not constitute unfair and deceptive trade practices because it had a legal right to decline to extend credit to consumers not meeting its criteria.

The Kennedys opposed the motion to dismiss for improper joinder, arguing that they had community property and that when one member was denied credit or had his or her credit history damaged, it affected the other. They also opposed Chase Manhattan's motion to dismiss or for summary judgment, arguing that the Act applied not only to credit reporting agencies, but also to the users of this information. The Kennedys asserted that a creditor may obtain a credit report without the consumer's permission only when the creditor meets the conditions set forth in section 1681b(c), which allows pre—screening consumers for offers of credit. In particular, they contended a condition of obtaining a credit report is that if the consumer meets the criteria established by the creditor prior to the selection of the consumer for the offer, the creditor must make a firm offer of credit to the consumer. If the consumer accepts this offer, the creditor may obtain a second credit report to verify that the consumer continues to meet the selection criteria. They contend the creditor is not allowed to apply a new set of criteria to the second credit report in order to disqualify a consumer from the credit offer after the consumer has accepted the offer.

Sally Kennedy averred that her credit history did not change between the time that she was selected for the offer of credit and the time that she accepted it, although this assertion is not set forth in the complaint. She asserted that Chase Manhattan did not indicate that any further conditions were made on the offer. She contended that the offer of credit evidenced the fact that she satisfied Chase Manhattan's credit criteria and that Chase Manhattan violated the Act by not extending this credit to her after it obtained her credit report without her knowledge. She argued

that this constituted obtaining the credit report under false pretenses and that informing the consumer of preapproval, but not honoring this offer, constituted an unfair trade practice.

Chase Manhattan responded that the Act was amended in 1997 to allow creditors to extend conditional firm offers to consumers. Chase Manhattan asserted that pursuant to section 1681b(c), consumer reporting agencies are permitted to furnish only limited information to creditors during the prescreening process and that after the consumer responds to the credit offer the creditor is permitted to access the creditor's credit report to determine whether the consumer satisfies its previously-determined criteria for credit worthiness. Chase Manhattan contended that after reviewing Sally Kennedy's complete credit history it determined that she did not satisfy its criteria for credit worthiness.

The district court granted Chase Manhattan's motion to dismiss and held the motion for improper joinder moot. The court determined that section 1681b(c) applied not only to credit reporting agencies but also to the entities requesting credit information. The court agreed with the bank's assertion that it had the legal right to decline credit to consumers who fail to satisfy its credit criteria, that the credit application informed Sally Kennedy of this possibility, and that Sally Kennedy's signature on the application evidenced her agreement to those terms. The court held that a "firm offer" under the Act means a firm offer "if you meet certain criteria" and that dissatisfaction with the pre-screening process did not state a cause of action under the Act. The court also held that the state law claims were preempted by the Act.

BOA, Transunion, and Experian also filed motions to dismiss. The district court granted all three motions, citing

the reasons set forth in its order granting Chase Manhattan's motion to dismiss. The Kennedys then moved for rehearing on the banks' motions, but the district court denied the motion for rehearing. The district court then entered judgment in favor of all defendants. The Kennedys timely appealed. In their appeal, the Kennedys maintain their complaint states a cause of action and that the district court erred by dismissing their claims.

Standard of Review

This Court reviews de novo the grant of a motion to dismiss for failure to state a claim[1]. In considering a motion to dismiss, the district court must take the facts as alleged in the complaint as true, and may not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[2] If the district court considers information outside of the pleadings, the court must treat the motion as a motion for summary judgment.[3] Although the court may not go outside the complaint, the court may consider documents attached to the complaint.[4]

In this instant case, many of the parties' arguments relate to information not in or attached to the complaint. The district court, however, relied on the complaint and the

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[1] 'See *Brown v. Nationsbank Corp.*, 188 F.3d 579, 585 (5th Cir. 1999).

[2] 'See *Id.* at 585-86 (quoting *Conley v. Gibson*, 355 U.S. 41, 45—46 (1957)).

[3] See *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536, 539 (5th Cir. 2003).

[4] *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498—99 (5th Cir. 2000); *see also Scanlan*, 343 F.3d at 536.

attachments, and it expressly granted the motions to dismiss. Therefore, this Court will not consider evidence outside the pleadings.[5]

Firm Offer of Credit

In their first issue, the Kennedys maintain the district court used an incorrect definition for "firm offer of credit." According to the Kennedys, the Act permits a bank to obtain a consumer credit report for the purpose of extending a firm offer of credit, but may decline credit for only three reasons: (1) because of information contained in the consumer's credit application, (2) because of verification of the information used to select the consumer for the offer, and/or (3) because the consumer fails to provide collateral. The Kennedys insist the banks used other criteria to decline them credit.

Section 1681b of the Act permits a consumer reporting agency to furnish a creditor with a consumer report in connection with a credit transaction not initiated by the consumer if "the transaction consists of a firm offer of credit."[6] The Act defines firm offer of credit as:

> any offer of credit to a consumer that will be honored if the consumer is determined, based on information in a Consumer report on the consumer, to meet the specific criteria used to select the Consumer for the offer.[7]

Notably, under the 1997 amendments to the Act,[8] a firm

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[5] *See Ware v. Associated Milk Producers, Inc.*, 614 F.2d 413, 414—15 (5th Cir. 1980).

[6] 15 U.S.C. § 1681b(c) (1) (B) (I).

[7] 15 U.S.C. § 1681a(1).

[8] *See* Carol A. Ahern & Jeffrey P. Taft, *The Consumer Credit*

offer of credit may be further conditioned on one or more of the following:

> 1) The consumer being determined, based on information in the consumer's application for the credit to meet specific criteria bearing on credit worthiness as applicable, that are established--
>
> (A) before selection of the consumer for the offer; and
>
> (B)for the purpose of determining whether to extend credit pursuant to the offer.
>
> (2) Verification--
>
> (A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit..., or other information bearing on the credit worthiness...of the consumer; or
>
> (B) of the information in the consumer's application for the credit, to determine that the consumer meets the specific criteria

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Reporting Reform Act of 1996: An Attempt to Make the Fair Creidt Reporting Act More Fair, 51 CONSUMER FIN. L.Q. 304, 305—07 (1997)(discussing amendments to the Act resulting from Consumer Credit Reporting Reform Act of 1996); *see also* Anne B. Fortney, Privacy, *Consumer Credit Reporting, and Fair Lending Developments,* 51 CONSUMER FIN. L.Q. 41, 42—43 (1997) (summarizing provisions of Consumer Credit Reporting Reform Act of 1996).

> bearing on credit worthiness...
> (3) The consumer furnishing any collateral that is a requirement for the extension of the credit . . . that was--
>
> (A) established before selection of the consumer for the offer of credit, and
>
> (B) disclosed to the consumer in the offer of credit . . . .[9]

Thus, a creditor must honor a firm offer of credit only if, based on information in the consumer report, the application, or other information bearing on credit worthiness, the consumer meets the criteria initially used to select that consumer for the offer. The creditor must establish the criteria for the firm offer of credit prior to extending the offer,[10] and must maintain a record of the criteria.[11]

Consumer reporting agencies, however, are only permitted to furnish limited information for a credit transaction not initiated by the consumer.[12] By permitting a creditor to obtain limited information, the Act allows creditors, like banks, to pre-screen potential customers.[13] In

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[9] 15 U.S.C. § 1681a (l) (omissions apply to firm offers of insurance).

[10] See 15 U.S.C. § 1681a(l) (1) (A).

[11] See 15 U.S.C. § 1681m(d) (3).

[12] The consumer reporting agency may furnish a consumer report that includes: (1) the name and address of a consumer, (2) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer, and (3) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity. See 15 U.S.C. § 1681b(c) (2).

[13] *See In re Trans Union Corp. Privacy Litigation,* 211 F.R.D. 328, 335 (N.D. Ill. 2002) (describing pre-screening as "the sale of target

the pre-screening process, credit reporting agencies compile lists of customers who meet specific criteria provided by the creditor, and then provide the lists to a creditor, who uses the lists to solicit customers with firm offers for credit in the form of pre-approved offers of credit.[14] To access more detailed information to determine whether the consumer meets a creditor's specific criteria bearing on credit worthiness, a creditor must obtain a consumer's authorization.[15] Thus, acceptance of a pre-approved offer of credit typically requires the consumer's agreement to permit the creditor to access the consumer's credit information. If a consumer responds to a pre-approved offer of credit, and authorizes the creditor to access the consumer's credit report, the creditor may then access the consumer's credit report to determine whether the consumer satisfies its previously-established for credit worthiness. As a result, the Act permits a creditor to make a "conditional" firm offer of credit; that is' an offer that is conditioned on the consumer meeting the creditor's previously-established criteria for extending credit. Although the Kennedys maintain the district court used an incorrect definition for firm offer of credit, the district court correctly determined that a firm offer of credit under the Act really means a 'firm offer if you meet certain criteria.'"[16] As

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marketing lists provided the lists are used for making firm offers of credit . . . to the consumers on the list").

[14] See 16 C.F.R., pt. 600, app. § 604(2) (Federal Trade Commission's interpretations of the Act).

[15] See 15 U.S.C. § 1681b(c) (1) (A).

[16] Order Granting Chase Manhattan's Motion to Dismiss, at p.4; accord *Tucker v. New Rogers Pontiac, Inc.*, No. 03 C 862, 2003 WL 220078297 (N.D. Ill. Sept. 9, 2003), at *3 (the Act provides that a creditor may extend a firm offer of credit and later revoke it, based on creditor's pre-determined criteria, which it need not disclose to the consumer); *Sampson v. Western Sierra Acceptance Corp.*, No. 03 C 1396, 2003 WL 21785612 (N.D. Ill. Aug. 1, 2003, at *2 (firm offer of

a result, the district court did not err by determining the Kennedys' complaint failed to state a claim.

The Kennedys' complaint fails to state a claim under the Act because Chase Manhattan's Pre-Approved Acceptance Certificate and BOA's Pre-selected Acceptance Certificate (collectively, the preapproved certificates) clearly establish that the respective offers constitute firm offers of credit under the Act. Considered together, the complaint and the attached exhibits show (1) the banks offered Sally and/or Richard Kennedy a pre-approved credit card account based on information from a consumer credit report, (2) Sally and/or Richard Kennedy received the offer because the consumer(s) satisfied the specific criteria used by the banks to make the offers, and (3) the credit card accounts were conditioned on the consumer(s) satisfying specific criteria bearing on credit worthiness.

The Kennedys also complain on appeal that the banks violated sections 1681a(l) and 1681b(c) because the banks declined to extend them credit after extending them firm offers of credit. The Act, however, allows a creditor to use information in a consumer report to verify a consumer's credit worthiness, and to withdraw a firm offer of credit if the consumer does not meet the creditor's previously-establis~~~ criteria for extending credit.[17] Here, the Kennedys authorized the banks to obtain a consumer report for the purposes of issuing a credit card account. Moreover, the banks notified the Kennedys in the preapproved certificates that they had the right to prohibit the use of their credit information in connection with any transaction that they did not initiate. Although the Kennedys insist the banks

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credit defined in terms of creditor's intention to honor an offer of credit in accordance with creditor's undisclosed, predetermined criteria).

[17] See 15 U.S.C. § 1681a(l) (2).

were prohibited from withdrawing their offers of credit, the Act allowed the banks to withdraw the offers if the Kennedys were not credit-worthy based on the consumer reports. Because the complaint alleged the banks engaged in permissible acts, the complaint failed to state a claim upon which relief could be granted.

The Complaint's Specific Allegations

In their complaint, the Kennedys specifically complained that the banks violated section 1681q of the Act by obtaining their credit information under false pretenses. Section 1681q provides a cause of action for obtaining credit information under false pretenses.[18] To prove this claim, the Kennedys were required to show the banks had an impermissible purpose in obtaining the credit report; that is, the banks lacked a permissible purpose.[19] "Permissible purposes" for obtaining consumer reports are set out in section 1681b of the Act. That section provides, in relevant part, that a consumer credit report may be furnished in connection with a credit transaction that is not initiated by the consumer if the applicable transaction consists of a firm offer of credit, or the consumer authorizes the report.[20] The Kennedys' complaint and the attachments, however, show

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[18] See 15 U.S.C. § 1681q ("[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under Title 18, imprisoned for not more than 2 years, or both").

[19] See *Korotki v. Att'y Servs. Corp. Inc.*, 931 F. Supp. 1269, 1276 (D. Md. 1996); see *also Edge v. Prof'l Claims Bureau, Inc.*, 64 F. Supp. 2d 115, 177 (E.D.N.Y. 1999); *Baker v. Bronx-Westchester Investigations, Inc.*, 850 F. Supp. 260, 264,(S.D.N.Y. 1994).

[20] See 15 U.S.C. § 1681b(c) (1) (A), (B) (i).

the banks obtained the Kennedys' credit reports for a permissible purpose. The complaint alleged that: the Kennedys received pre-qualified offers for credit card accounts, the Kennedys accepted the offers by returning the applications, the banks obtained credit reports, and the banks notified the Kennedys that they would not open credit card accounts for them. Indeed, the pre-approved certificates notified the Kennedys that the offered credit might not be extended if, after the Kennedys responded to the offers, the banks determined the Kennedys did not meet the criteria used to select them for the offers and any other applicable criteria bearing on credit worthiness.[21] Thus, the banks fully apprised the Kennedys that the banks would review their credit history prior to determining whether the banks would extend the offered credit. The Kennedys signed the pre-approved certificates, agreed to the terms of the offers, and authorized the banks to access their credit information. Thus, the complaint and the pre-approved certificates show the banks did not obtain the Kennedys' credit information under false pretenses. Instead, the banks pre-screened customers for firm offers of credit, and then post-screened accepted offers to determine eligibility based on credit worthiness. Consequently, the complaint failed to state a claim under section 1681q.

The Kennedys also alleged the banks violated section 1681e by failing to maintain reasonable procedures and certifications needed to comply with the Act. Section 1681e, however, imposes duties upon "credit reporting agencies." Because the banks are not credit reporting

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[21] Chase Manhattan's notice provided: "The offered credit may not be extended if, after you respond to this offer, we determine that you do not meet the criteria used to select you for this offer or any other applicable criteria bearing on credit worthiness." BOA's notice provided: "The credit may not be extended if, after you respond, we find that you do not meet the criteria used to select you for this offer or any applicable criteria bearing on credit worthiness."

agencies, the Kennedys' allegation under section 1681e failed to state a claim. As a result, the district court properly dismissed the Kennedys' claims against the banks.

Claims Against the Credit Reporting Agencies

In their complaint, the Kennedys alleged that the defendant credit reporting agencies violated section 1681e by failing to adopt reasonable procedures. The Kennedys, however, did not allege any specific factual allegations regarding the credit reporting agencies' procedures or specify how the agencies violated the Act. Notably, the complaint did not allege the credit reporting agencies provided inaccurate credit information.[22] Because the complaint simply alleged a violation of section 1681e without any supporting factual allegations, the Kennedys' claims against the credit reporting agencies were nothing more than unsupported legal conclusions. Despite this weakness, the complaint and the attachments show that the Kennedys can prove no set of facts that would entitle them to relief.

A plaintiff bringing a claim that a reporting agency violated the "reasonable procedures" requirement of section 1681e must first show that the reporting agency released the report in violation of section 1681b.[23] The Kennedys' complaint, however, does not allege the credit reporting

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[22] Section 1681e(b) requires a consumer reporting agency to follow reasonable procedures to assure maximum possible accuracy of the information provided in the report. See 15 U.S.C. 1681e(b) . This Court's analysis of the Kennedys' claims does not address the accuracy requirement because the Kennedys did not allege the credit reporting agencies provided inaccurate information.

[23] See *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 267 (5th Cir. 2000).

agencies released their credit information in violation of section 1681b. Instead, the complaint alleges the credit reporting agencies violated Section 1681e by not adopting reasonable procedures for meeting the needs of commerce for consumer credit in a manner which is fair and equitable to the consumer with regard to confidentiality and proper utilization of such information in accordance with the requirements of the . . . Act." In essence, the Kennedys alleged the credit reporting agencies acted under section 1681b—the provision that permits a consumer reporting agency to provide a consumer report in connection with a firm offer of credit, but not that the credit reporting agencies violated section 1681b.

In addition, the Kennedys cannot show the credit reporting agencies released their credit reports in violation of section 1681b because the banks' pre-approved certificates constituted firm offers of credit, and because the Kennedys authorized the release of their credit information. Instead, the complaint and the pre-approved certificates show the credit reporting agencies were authorized to release the Kennedys' credit information. The pre-approved certificates show the Kennedys signed the banks' firm offers of credit and expressly authorized the banks to obtain their credit information from the credit reporting agencies. As a result, the district court did not err by finding the Kennedys failed to state a claim against the credit reporting agencies.

Conclusion

The district court correctly determined that the Act permits a creditor to pre—screen consumers for firm offers of credit, and to withdraw an offer if a consumer fails to meet the creditor's previously-established criteria for credit worthiness. As a result, the district court did not err in finding the Kennedys failed to state a claim against the banks. In addition, the district court correctly determined that

a plaintiff who complains under section 1681e after a consumer reporting agency releases limited consumer information pursuant to a firm offer of credit, or releases a consumer credit report upon the consumer's authorization, in the absence of an allegation of inaccurate information, fails to state a claim. Because the district court did not err in these determinations, the district court properly dismissed the Kennedys' claims. As a result, this Court AFFIRMS the judgment of the district court.

AFFIRMED.

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2003 JUL 30 PM 2:47
LORETTA G WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RICHARD D. KENNEDY, ET AL	CIVIL ACTION
VERSUS	NO. 03-0050
CHASE MANHATTAN BANK, ET AL	SECTION "M"

JUDGMENT

The Court having dismissed all defendants in the above captioned matter on various motions to dismiss,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Chase Manhattan Bank, USA, N.A., Experian Information Solutions, Inc., Transunion, LLC and Bank of America, NA (USA), and against plaintiff, Richard D. Kennedy and Sally S. Kennedy, dismissing the plaintiffs' suit with prejudice.

New Orleans, Louisiana, this 30TH DAY OF JULY, 2003.

/s/Peter Beer
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY
JUL 30 2003

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
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LORETTA G WHYTE
CLERK

UNITED STATES DISTRICT COUT
EASTERN DISTRICT OF LOUISIANA

RICHARD D KENNEDY, et al. *CIVIL

ACTION

VERSUS * NO. 03-0050

CHASE MANHATTAN BANK, et al.* SECTION M

ORDER

Before the Court is a Motion to Dismiss filed by Chase Manhattan Bank which came for hearing May 28, 2003, on the briefs.

Considering the motion, the opposition thereto, and the applicable law, the Court has determined that the Motion to Dismiss is meritorious and is hereby **GRANTED.** All claims against Chase Manhattan Bank are **DISMISSED.** The Motion for Improper Joinder as it relates to movant is **MOOT.**

I. FACTS

The facts as set forth in the Complaint are as follows:

Plaintiff, Sally Kennedy, received a "pre-qualified" offer for a credit cards account from the defendant, Chase Manhattan Bank (Chase). Based on the representation made in the letter, plaintiff believed she was pre-approved for credit and accepted the offer by returning the application provided by the bank. A copy of the offer is attached to the complaint. Thereafter, Chase obtained a credit report from the defendant credit reporting agencies and notified plaintiff that she could not open an account based on the information in her credit report. Plaintiffs then filed this suit *pro se*, claiming that Chase violated the Fair Credit Reporting Act (FCRA) and the Louisiana UnfairTrade and Consumer Protection Act. Plaintiffs also claim that Chase obtained the plaintiff's credit report under 15 U.S.C. § 1681b, but then refused to honor its firm offer of credit.

Chase seeks dismissal for failure to state a claim for which relief may be granted contending that the cited provisions of the FCRA are only applicable to consumer reporting agencies, that Sally Kennedy gave her permission for Chase to review her credit history and that Chase has a legal right to decline to extend credit to anyone who fails to satisfy its criteria.

II. LAW AND ANALYSIS

Standard of Review

A district court cannot dismiss a complaint for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir.1995). In reviewing a Rule 12(b)(6) motion, the Court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. Baker v. Putnal, 75 F.3d 190, 196 (5th Cir.1996).

Fair Credit Reporting Act (FCRA)

Plaintiff maintains that when Chase obtained her credit report, without her knowledge or consent, Chase had a legal obligation to make a firm offer of credit and to honor that offer. Plaintiff claims that Chase applied a new set of criteria for determining credit worthiness, *after* Ms. Kennedy accepted the offer, which they allege is a violation of the FCRA. Plaintiffs maintain that Ms. Kennedy's credit report had not changed since she accepted the offer.Section 1681b(c) of the FCRA provides in pertinent part that a consumer reporting agency may furnish a consumer report in connection with a credit transaction that is not initiated by the consumer if the transaction consists of a firm offer of credit.[1] This section allows the sale of marketing lists as long as the lists are used for making firm offers of credit to the consumers on the list. See In re Trans Union Corp. Privacy Litigation, 211 F.R.D. 328, 335 (N.D. III. 2002).

A "firm offer" is a term of art defined by the FCRA as any offer of credit that will be honored if the consumer is determined, based on information in a consumer report, to meet the criteria used to select the consumer for the offer. The offer may further be conditioned on the consumer being determined to meet specific criteria bearing on credit worthiness that is established before selection of the consumer and for the purpose of determining whether to extend credit. 15 U.S.C. § 1681a(1).

The information that a person may receive through

[1] Although Chase maintains that this provision only sets forth the duties owed by a consumer reporting agency, the Court concludes that the FCRA applies to consumer reporting agencies as well as to entities requesting credit information. See Parpas v. City of Calumet City, 9 F.Supp.2d 943, 946 (N.D.Ill.1998).

this "pre-screening" is limited to: a) the name and address of a consumer; b) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and c) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or entity. 15 U.S.C. § 1681 b(c)(2).

Chase maintains that it has a legal right to decline credit to consumers who fail to satisfy its credit criteria. Chase points to its application wherein plaintiff was informed of the possibility that Chase might decline to extend credit. Chase contends that plaintiffs signature on the application evidences her agreement to those terms.

The Court finds Chase's arguments meritorious. Because the FCRA has been manipulated such that a "firm offer" really means a "firm offer if you meet certain criteria," plaintiffs allegations do not amount to a violation of the FCRA, but merely evidence a dissatisfaction with this prescreening process. To the extent plaintiff has alleged violation of state law, those laws are expressly preempted by the FCRA. 15 U.S.C. § 1681t(a).

Accordingly, the Motion to Dismiss is **GRANTED.** Counsel for defendant is requested to submit a judgment consistent with this order.

New Orleans, Louisiana, this 19th day of May, 2003.

_____/s/Peter Beer_____
Peter Beer
United States District Judge

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2003MAY 28 AM 9:16
LORETTA G WHYTE
CLERK

UNITED STATES DISTRICT COUT

EASTERN DISTRICT OF LOUISIANA

RICHARD D KENNEDY, et al. *CIVIL ACTION

VERSUS * NO. 03-0050

CHASE MANHATTAN BANK, et al.* SECTION M

ORDER

Before the Court is a Motion to Dismiss filed by Bank of America (hereafter BOA), which came for hearing May 28, 2003 and is opposed. For the reasons set forth in this Court's order dated May 19, 2003, the Motion to Dismiss is **GRANTED.** Counsel for defendant is requested to submit a judgment consistent with this order.

New Orleans, Louisiana, this 28th day of May, 2003.

_____/s/Peter Beer_____
Peter Beer
United States District Judge

DATE OF ENTRY
MAY 28 2003

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2003 JUL 17 AM 11:39
LORETTA G WHYTE
CLERK

UNITED STATES DISTRICT COUT
EASTERN DISTRICT OF LOUISIANA

RICHARD D KENNEDY, et al. *CIVIL ACTION

VERSUS * NO. 03-0050

CHASE MANHATTAN BANK, et al.* SECTION M

ORDER

Before the Court is a Motion to Dismiss filed by Defendant Experian Information Solutions, Inc., (Experian), which came for hearing June 25, 2003, on the briefs. As this Court found in its Order dated May 19, 2003, Plaintiffs' allegations do not amount to a violation of the FCRA, but merely evidence a dissatisfaction with the prescreening and credit reporting process.

Therefore, Defendant's Motion to Dismiss is hereby **GRANTED.** All claims against Experian are DISMISSED.

New Orleans, Louisiana, this 17TH day of July, 2003.

_____/s/Peter Beer_____
Peter Beer
United States District Judge
DATE OF ENTRY
JUL 17 2003

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2003 JUL 23 PM 12:02
LORETTA G WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RICHARD D KENNEDY, et al. *CIVIL ACTION

VERSUS * NO. 03-0050

CHASE MANHATTAN BANK, et al.* SECTION M

ORDER

Before the Court is a Motion to Dismiss filed by Defendant Trans Union, LLC. (Trans Union) which came for hearing July 23,2003, on the briefs. As this Court found in its Order dated May 19, 2003, Plaintiffs' allegations do not amount to a violation of the FCRA, but merely evidence a dissatisfaction with the prescreening and credit reporting process.

Therefore, Defendant's Motion to Dismiss is hereby **GRANTED.** All claims against Trans Union are DISMISSED.

New Orleans, Louisiana, 23rd day of July, 2003.

_____/s/Peter Beer_____
Peter Beer
United States District Judge

DATE OF ENTRY
JUL 24 2003

FILED

U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2003 JUL 16 PM 1:55
LORETTA G WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RICHARD D KENNEDY, et al.	*	CIVIL ACTION
VERSUS	*	NO. 03-0050
CHASE MANHATTAN BANK, et al.	*	SECTION M

ORDER

Before the Court is a Motion for Rehearing on the Motion to Dismiss granted by this Court's Order dated May 19, 2003. The Motion was opposed and came for hearing on June 25, 2003, on the briefs. Considering the Motion, the opposition thereto, the Court has determined that the Motion for Rehearing is DENIED

New Orleans, Louisiana, 16th day of July, 2003.

_____/s/Peter Beer_____
Peter Beer
United States District Judge

DATE OF ENTRY
JUL 16 2003

U.S. COURT OF APPEALS
FILED
JUN 07 2004 CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEAL

FOR THE FIFTH CIRCUIT

No. 03-30811

RICHARD D KENNEDY; SALLY S KENNEDY
Plaintiffs - appellants

V.

CHASE MANHATTAN BANK USA NA;

EXPERIAN INFORMATION SOLUTIONS INC;

TPANSUNION, LLC; BANK OF AMERICA, NA (USA)
Defendants - Appellees

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

Before DAVIS, BENAVIDES, and PRADO, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED

ENTERED FOR THE COURT:

/S/Edward C. Prado
United states Circuit Judge

REHG-2

TEXT OF RELEVANT STATUTES

The relevat statutes involved in the case, pursuant to Supreme Court Rule 14(1)(f), iclude:

Section 1681. Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

Section 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) Consumer Report. -

(1) In general. - The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for -

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) Exclusions. - The term "consumer report" does not include-

(A) any -

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the

opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (o) of this section.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) The term "medical information" means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

(j) Definitions Relating to Child Support Obligations. -

(1) Overdue support. - The term "overdue support" has the meaning given to such term in section 666(e) of title 42.

(2) State or local child support enforcement agency. - The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) Adverse Action. -

(1) Actions included. - The term "adverse action" -

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means -

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the

terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is -

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) Applicable findings, decisions, commentary, and orders. - For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

(l) Firm Offer of Credit or Insurance. - The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness or insurability, as applicable, that are established -

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification -

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was -

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) Credit or Insurance Transaction That Is Not Initiated by the Consumer. - The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of -

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) State. - The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(o) Excluded Communications. - A communication is described in this subsection if it is a communication -

(1) that, but for subsection (d)(2)(D) of this section, would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of -

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and

(5) with respect to which -

(A) the consumer who is the subject of the communication -

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication -

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which an action is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) Consumer Reporting Agency That Compiles and Maintains Files on Consumers on a Nationwide Basis. - The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the

practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nationwide:

(1) Public record information.

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

Section 1681b. Permissible purposes of consumer reports

(a) In general

Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe -

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information -

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that -

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child suppor payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of title 42 for use to set an initial or modified child support award.

(b) Conditions for furnishing and using consumer reports for employment purposes

(1) Certification from user

A consumer reporting agency may furnish a consumer report for employment purposes only if -

(A) the person who obtains such report from the agency certifies to the agency that -

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(2) Disclosure to consumer

(A) In general

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, less -

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application -

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 1681m(a)(3) of this title; and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if -

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions

(A) In general

Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates -

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(B) Application by mail, telephone, computer, or other similar means

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 1681m(a) of this title, within 3 business days of taking such action, an oral, written or electronic notification -

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if -

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(4) Exception for national security investigations

(A) In general

In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that -

(i) the consumer report is relevant to a national security investigation of such agency or department;

(ii) the investigation is within the jurisdiction of such agency or department;

(iii) there is reason to believe that compliance with paragraph (3) will -

(I) endanger the life or physical safety of any person;

(II) result in flight from prosecution;

(III) result in the destruction of, or tampering with, evidence relevant to the investigation;

(IV) result in the intimidation of a potential witness relevant to the investigation;

(V) result in the compromise of classified information; or

(VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.

(B) Notification of consumer upon conclusion of investigation Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made -

(i) a copy of such consumer report with any classified information redacted as necessary;

(ii) notice of any adverse action which is based, in part, on the consumer report; and

(iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

(C) Delegation by head of agency or department For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her authorities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the Senior Executive Service or equivalent civilian or military rank.

(D) Report to the Congress

Not later than January 31 of each year, the head of each agency and department of the United States Government that exercised authority under this paragraph during the preceding year shall submit a report to the Congress on the number of times the department or agency exercised such authority during the year.

(E) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Classified information

The term "classified information" means information that is protected from unauthorized disclosure under Executive Order No. 12958 or successor orders.

(ii) National security investigation

The term "national security investigation" means any official inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by consumer

(1) In general

A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) of this section in connection with any credit or insurance transaction that is not initiated by the consumer only if -

(A) the consumer authorizes the agency to provide such report to such person; or

(B)(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e) of this section; and

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e) of this section, to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph.

(2) Limits on information received under paragraph (1)(B)

A person may receive pursuant to paragraph (1)(B) only -

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries

Except as provided in section 1681g(a)(5) of this title, a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) Reserved

(e) Election of consumer to be excluded from lists

(1) In general

A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) of this section in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph

(2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) Manner of notification

A consumer shall notify a consumer reporting agency under paragraph (1) -

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system

Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall -

(A) inform the consumer that the election is effective only for the 2-year period following the election if the consumer does not submit to the agency a signed notice of

election form issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) Effectiveness of election

An election of a consumer under paragraph (1) -

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency -

(i) subject to subparagraph (C), during the 2-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

(5) Notification system

(A) In general

Each consumer reporting agency that, under subsection (c)(1)(B) of this section, furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall -

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after September 30, 1996, and not less than annually thereafter, in a publication of general circulation in the area served by the agency -

(I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to notify the agency of the consumer's election under clause (i).

(B) Establishment and maintenance as compliance

Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.

(6) Notification system by agencies that operate nationwide

Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) Certain use or obtaining of information prohibited

A person shall not use or obtain a consumer report for any purpose unless -

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and

(2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

(g) Furnishing reports containing medical information

A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information about a consumer, unless the consumer consents to the furnishing of the report.

Section 1681e. Compliance procedures

(a) Identity and purposes of credit users

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(c) Disclosure of consumer reports by users allowed

A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer

from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report.

(d) Notice to users and furnishers of information

(1) Notice requirement

A consumer reporting agency shall provide to any person -

(A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or

(B) to whom a consumer report is provided by the agency; a notice of such person's responsibilities under this subchapter.

(2) Content of notice

The Federal Trade Commission shall prescribe the content of notices under paragraph (1), and a consumer reporting agency shall be in compliance with this subsection if it provides a

notice under paragraph (1) that is substantially similar to the Federal Trade Commission prescription under this paragraph.

(e) Procurement of consumer report for resale

(1) Disclosure

A person may not procure a consumer report for purposes of reselling the report (or any information in the report) unless the person discloses to the consumer reporting agency that originally furnishes the report -

(A) the identity of the end-user of the report (or information); and

(B) each permissible purpose under section 1681b of this title for which the report is furnished to the end-user of the report (or information).

(2) Responsibilities of procurers for resale

A person who procures a consumer report for purposes of reselling the report (or any information in the report) shall -

(A) establish and comply with reasonable procedures designed to ensure that the report (or information) is resold by the person only for a purpose for which the report may be furnished under section 1681b of this title, including by requiring that each person to which the report (or information) is resold and that resells or provides the report (or information) to any other person -

(i) identifies each end user of the resold report (or information);

(ii) certifies each purpose for which the report (or information) will be used; and

(iii) certifies that the report (or information) will be used for no other purpose; and

(B) before reselling the report, make reasonable efforts to verify the identifications and certifications made under subparagraph (A).

(3) Resale of consumer report to a Federal agency or department

Notwithstanding paragraph (1) or (2), a person who procures a consumer report for purposes of reselling the report (or any information in the report) shall not disclose the identity of the end-user of the report under paragraph (1) or (2) if -

(A) the end user is an agency or department of the United States Government which procures the report from the person for purposes of determining the eligibility of the consumer concerned to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i) of this title); and

(B) the agency or department certifies in writing to the person reselling the report that nondisclosure is necessary to protect classified information or the safety of persons employed by or contracting with, or undergoing investigation for work or contracting with the agency or department.

Section 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on basis of information contained in consumer reports If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall -

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically -

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right -

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

(b) Adverse action based on information obtained from third parties other than consumer reporting agencies

(1) In general

Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for

such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(2) Duties of person taking certain actions based on information provided by affiliate

(A) Duties, generally

If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall -

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) Action described An action referred to in subparagraph (A) is an adverse action described in section 1681a(k)(1)(A) of this title, taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1681a(k)(1)(B) of this title.

(C) Information described

Information referred to in subparagraph (A) -

(i) except as provided in clause (ii), is information that -

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, (FOOTNOTE 1) credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include -

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) Duties of users making written credit or insurance solicitations on basis of information contained in consumer files

(1) In general

Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that is provided to that person under section 1681b(c)(1)(B) of this title, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that -

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

(2) Disclosure of address and telephone number

A statement under paragraph (1) shall include the address and toll-free telephone number of the appropriate notification system established under section 1681b(e) of this title.

(3) Maintaining criteria on file

A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) Authority of Federal agencies regarding unfair or deceptive acts or practices not affected

This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of

false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

Section 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the

work expended in responding to the pleading, motion, or other paper.

Section 1681o. Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

Section 1681p. Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to

an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

Section 1681q. Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, imprisoned for not more than 2 years, or both.